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FILED
YOLO SUPERIOR COURT

JUL 24 2009

R. Miles
Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF YOLO

10
11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,

13 Plaintiff,

14 vs.

15 MARCO ANTONIO TOPETE,

16
17 Defendant(s)

Dept. 2 Case No. 08-3355

PEOPLE'S OPPOSITION TO
DEFENDANT'S MOTION FOR
CONTINUANCE OF TRIAL; POINTS
AND AUTHORITIES; ARGUMENTS

DATE: August 7, 2009
TIME: 9:00 AM
DEPT: 2

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19 To the Honorable Judge Timothy L. Fall, the Defendant, and Counsel for
20 the Defendant, Mr. Hayes Gable and Mr. Tom Purtell:

21 Please take notice that at the above time and place, the People will
22 move the court to deny the Defendant's motion to continue the trial 18 months
23 from July 9th, 2009. The People's Motion will be based on the following
24 points and authorities, declaration, and arguments. As an alternative to the
25 court granting the motion to continue the trial for 18 months out as
26 requested, the People propose that the court closely monitor the case,
27 perhaps on an every 6 week basis.
28

Points and Authorities

Under Penal Code section 1050, the People, the defendant, the victim, and the witnesses all have a right to the expeditious disposition of a criminal case. (*People v. Santamaria* (1991) 229 Cal.App.3d 269, 277.) Section 1050 states in pertinent part:

(a) The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. Excessive continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses. . . . ¶ (e) Continuances shall be granted only upon a showing of good cause. . . .

When the purpose of the requested continuance is to secure the attendance of a witness, the defense must show (1) that they exercised due diligence to secure the attendance of the witness, (2) that the expected testimony is material and not cumulative, (3) that the testimony can be secured in a reasonable time, and (4) that the facts sought to be proven could not be proven by other means. (*People v. Howard* (1992) 1 Cal.4th 1132, 1171; similarly see *People v. Strozier* (1993) 20 Cal.App.4th 55, 60-61.) "The failure to attempt to secure the attendance of a witness for whom a continuance is sought indicates a lack of due diligence." (*Pickett v. Municipal Court* (1970) 12 Cal.App.3d 1158, 1162-1163.) An attempt to serve the witness before they leave the jurisdiction should be made even if the witness is believed to be going on vacation. (*Perryman v. Superior Court* (2006) 141 Cal.App.4th 767, 778; *Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1277-1278.)

A continuance on the ground of lack of preparation must be supported by a showing that defendant and counsel used due diligence and all reasonable effort to prepare for the trial. (*People v. Grant* (1988) 45 Cal.3d 829, 844;

1 *People v. Johnson* (1970) 5 Cal.App.3d 851, 859.) Even a continuance to
2 obtain counsel of defendant's choice may properly be denied " 'if the accused
3 is "unjustifiably dilatory" in obtaining counsel, or "if he arbitrarily
4 chooses to substitute counsel at the time of trial." ' " (*People v. Jeffers*
5 (1987) 188 Cal.App.3d 840, 850; see also, *People v. Pigage* (2003) 112
6 Cal.App.4th 1359, 1368.) " '[I]t is not every denial of a request for more
7 time that violates due process even if the party fails to offer evidence or
8 is compelled to defend without counsel.' " (*People v. Howard, supra*, 1
9 Cal.4th at pp. 1171-1172.)

10 What constitutes good cause under section 1050 for a continuance of a
11 criminal trial is a matter that lies within the sound discretion of the trial
12 court. (*People v. Johnson* (1980) 26 Cal.3d 557, 570; *People v. Strozier*,
13 *supra*, 20 Cal.App.3d at p. 60.) A trial court's ruling on a motion for a
14 continuance is ordinarily reviewed for an abuse of discretion. (*People v.*
15 *Jenkins* (2000) 22 Cal.4th 900, 1037.)

16 **Declaration of Garrett Hamilton**

17 I am one of the prosecutors assigned to prosecute the above entitled
18 case. In writing this responsive declaration I am numbering the paragraphs to
19 correspond to the numbering in Mr. Gable's declaration.

20 4. Due to the fact that, to date, the declaration of the defense
21 investigator is under seal and I have not seen it, I am unable to argue with
22 the merits of whether or not it contains any cause for either remaining
23 sealed, or good cause for continuing the trial date. I have to rely on the
24 court doing an in camera inspection and reaching a threshold conclusion about
25 whether or not it will remain sealed.

26 6. (a) Discovery—While we continue to work on the case and will be turning
27 over more discovery in the future, much of the discovery was turned over a
28 long time ago[for instance, the first 1963 pages were turned over by November

1 25th, 2008. There are no specifics mentioned in the declaration about how much
2 time[in hours or days] has been spent on these tasks, or how much time[in
3 hours or days] needs to be spent on it.

4 Mr. Gable asserts that discovery has not been turned over in regard to
5 approximately 10 of the aggravating factors. There are no specifics in the
6 motion about which aggravating factors lacked discovery, but on July 15th Mr.
7 Gable sent me an email listing 7 factors which were lacking discovery. I have
8 responded with an email telling him specifically which pages in the discovery
9 have the reports to those factors. One of the factors, not 7, had minimal
10 documentation, specifically a juvenile arrest from 1986. Woodland PD has now
11 provided us with full reports on that incident, and they are being discovered
12 to Mr. Gable.

13 Mr. Gable is being served a written response to his informal request
14 for discovery[dated March 16th, 2009; 37 items requested] on July 24th. Much of
15 the requested discovery has already been turned over. Any disputes as they
16 relate to his discovery request that result in a formal motion will be
17 limited to narrow areas, and I doubt will result in a significant quantity of
18 discovery, especially in comparison to the large quantity that has already
19 been turned over.

20 (b) Investigation—Mr. Gable asserts that his investigation of guilt
21 issues is "hobbled" by our failure to provide requested discovery. I do not
22 know what this refers to. Mr. Gable has never notified me that a failure to
23 provide something specifically has "hobbled" them. In a telephone
24 conversation this week Mr. Gable asked me for a specific piece of information
25 relating to a potential witness that called in to law enforcement the night
26 of the murder; we are trying to establish if we even have that information
27 and so far our investigators haven't been able to determine if that
28 information even is obtainable.


1 (c) Expert Witnesses—I am unable to respond to this other than to say
2 that Mr. Gable has not informed us that any expert is awaiting the production
3 of anything specifically that has not been turned over.

4 (d) I am unable to respond to this and note that there is no detail in
5 Mr. Gable's declaration about how much time they are able to meet with the
6 defendant, and how much time they need that they are not getting.

7 7. I don't have the experience working death penalty cases that Mr. Gable
8 has, however I am unaware of anything in this case that is going to require
9 another 18 months to prepare. I am simply not in a position to address the
10 sealed declaration that has been submitted, and therefore am unaware of
11 anything contained therein that would take 18 months.

12 I declare under penalty of perjury that the foregoing is correct.

13 Executed on July 24, 2009, at Woodland, California.

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16 _____
17 GARRETT HAMILTON
18 SUPERVISING DEPUTY DISTRICT ATTORNEY
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PROOF OF SERVICE

I, WENDY WILCOX, declare that I am a resident of the County of Yolo; I am over the age of eighteen years and not a party to the within entitled action; my business address is 301 Second Street, Woodland, California 95695.

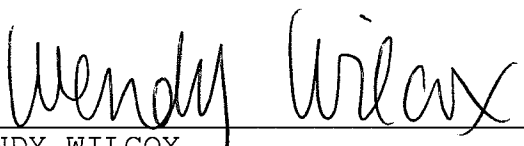
On July 24, 2009, I served the within PEOPLE'S OPPOSITION TO DEFENDANT'S MOTION FOR CONTINUANCE OF TRIAL; POINTS AND AUTHORITIES; ARGUMENTS on counsel for defendant in this action, by faxing a true copy thereof to (530) 662-3018 and (916) 447-2988 and by placing a true copy thereof enclosed in a sealed envelope and deposited the same in the United States mail at Woodland, California, addressed to the counsel of record in this action, as follows:

THOMAS PURTELL
ATTORNEY AT LAW
430 3RD STREET
WOODLAND, CA 95695

HAYES GABLE
ATTORNEY AT LAW
428 J ST., STE. 354
SACRAMENTO, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 24, 2009, at Woodland, California


WENDY WILCOX